Filed 4/26/13 Marriage of Trejo CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of JULIETA and HUGO TREJO.	
JULIETA TREJO, Respondent, v. HUGO TREJO, Appellant.	E054775 (Super.Ct.No. SBFSS93013) **OPINION**

APPEAL from the Superior Court of San Bernardino County. John M. Pacheco and Raymond L. Haight III, Judges.* Affirmed in part; reversed in part with directions.

Van Antwerp Law Firm and L. Walker Van Antwerp III for Appellant.

No appearance for Respondent.

* Judge Pacheco heard the matter and rendered the statement of decision. Judge Haight ultimately signed the judgment. (See fn. 1, *ante*, page 2.)

On May 3, 2006, respondent Julieta Trejo (Julieta) filed her petition for dissolution of her marriage to appellant Hugo Trejo (Hugo). The petition sought custody and visitation determinations for the couple's two children, then ages 14 and 11. It also sought spousal support and the determination of rights to the community property.

A court trial commenced on April 9, 2009. Julieta was represented by attorney Fernando Bernheim. Hugo appeared, without an attorney. The issues presented were custody and visitation, child support, permanent spousal support, and division of community property.

Attorney Bernheim alleged Hugo had breached his fiduciary duties and asked the court to select an alternate valuation date for the real property. For the same reasons, he asked that Julieta be awarded 100 percent of Hugo's pension plan. He also asked that Hugo pay attorney fees and costs of $8,000.

The court heard several partial days of testimony on these subjects. On July 6, 2009, it entered an 11-page statement of decision.[1] On appeal, Hugo challenges four rulings of the trial court.[2]

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[1] The statement of decision is signed by Judge Pacheco and dated July 2, 2009. It states that it will become a judgment within 15 days unless an objection is filed. No objection is in our record, and presumably the parties have followed the statement of decision in the last several years.

On August 8, 2011, a judgment was signed by Judge Haight to allow an appeal to be taken. The judgment consists of extensive extracts from the earlier statement of decision. Accordingly, we consider the appeal to be contesting Judge Pacheco's original statement of decision, and our citations will be to that document.

[2] On appeal, Hugo is represented by counsel. Julieta has not filed a respondent's brief.

First, Hugo contends that the trial court erred in setting an alternate valuation date pursuant to Family Code section 2552.[3] Second, Hugo contends the trial court erred in finding a breach of fiduciary duty by Hugo. As a result, Hugo contends that the award of 100 percent of the family home proceeds to Julieta as well as selection of an alternate valuation date unfavorable to Hugo was error under section 1101. He also contends that the evidence did not support the market value used. Third, Hugo contends there was no factual or legal basis for awarding Julieta 100 percent of Hugo's pension as a penalty. Fourth, Hugo contends the trial court had no authority to make the support order retroactive. We examine the facts and law relating to each of these contentions separately.

I

NOTICE OF ALTERNATE VALUATION DATE

As discussed in the next section, the trial court exercised its discretion under section 2552, subdivision (b) to change the valuation date. That subdivision states: "Upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and before trial to accomplish an equal division of the community estate of the parties in an equitable manner."

[3] Unless otherwise indicated, all further statutory references are to the Family Code.

Hugo's first contention is that the requisite 30-day notice was not given to Hugo by Julieta or her attorney. Counsel does not discuss the consequences of the alleged error nor the remedy he proposes.

Although not relied on by counsel, we note that former California Rules of Court, rule 5.126 provided that a form application for separate trial must be used to provide the notice required in Family Code section 2552, subdivision (b). However, this provision was repealed as of January 1, 2013, and replaced by California Rules of Court, rule 5.390.

California Rules of Court, rule 5.390 states that a party may bifurcate one or more issues to be tried separately before other issues are tried. If a party seeks an alternative valuation date, it must now complete form FL-315 and provide a declaration that includes the reasons for supporting the alternative valuation date.

It thus appears that, under either version of the rule, the notice provision of section 2552, subdivision (b) applies only when a party seeks a separate trial of the issue. The notice provision would therefore not apply to the request here, which merely advised Hugo and the court that Julieta would be seeking an alternative valuation date during the trial.

In any event, we find no violation of the notice requirement. Attorney Bernheim first raised the issue when the hearing began on April 9, 2009. Subsequent hearings were held on May 12, May 19, and June 4, 2009. We thus find that, even if notice was required in this situation, attorney Bernheim, in court, gave respondent more than 30 days

notice of his intention to seek an alternative valuation date. We therefore find no violation of the notice provision of section 2552, subdivision (b).

II

BREACH OF FIDUCIARY DUTY AND ITS CONSEQUENCES

A. *Fiduciary Duties.*

Section 721, subdivision (b) provides: "[I]n transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other."

Section 1101, subdivision (a) provides that: "A spouse has a claim against the other spouse for any breach of the fiduciary duty that results in impairment to the claimant spouse's present undivided one-half interest in the community estate, including, but not limited to, a single transaction or a pattern or series of transactions, which transaction or transactions have caused or will cause a detrimental impact to the claimant spouse's undivided one-half interest in the community estate."

B. *The Trial Court's Decision.*

The trial court found: "Petitioner testified that she was away on vacation in Mexico on July 15, 2003, (Exhibits 5 and 9). Respondent failed to obtain her permission to sign her name on the deed. Respondent forged Petitioner's name on a grant deed transferring the real property . . . to himself as his sole and separate property (Exhibit 1).

The evidence showed that Petitioner was in Mexico on vacation at the time Respondent forged her signature."

The trial court also found that the parties had an equity line of credit on their home. The court stated: "The testimony and evidence showed that Respondent withdrew $97,300 from the equity line of credit. At the time of separation, the equity credit line had an outstanding balance of $19,968.00. Respondent withdrew $77,331.26 from the equity line of credit after the date of separation." The court found that Hugo had not informed Julieta of these withdrawals, and that he withdrew all of the equity from the family residence.

In her petition, Julieta alleges that the parties were married on April 22, 1989, and separated on March 6, 2006. In his response, Hugo states that the parties separated on June 1, 2003. The trial court adopted the separation date in Julieta's petition.

Hugo's counsel concedes the forgery but argues, without record citation,[4] that the forged deed, dated July 13, 2003, was part of an *acquisition* transaction in which Hipolino Garcia sold the property to Hugo on July 14, 2003, i.e., after Hugo's proposed June 1, 2003, date of separation.

No record of the alleged transaction was produced at trial, and counsel does not explain why an interspousal deed would be necessary on the day before the purchase transaction.

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[4] Counsel is reminded that California Rules of Court, rule 8.204(a)(1)(C) provides that a brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." It is not our obligation to search the record to attempt to find support for counsel's assertions.

Hugo's counsel also states, again without record citation: "Julieta points out that she was in Mexico in July of 2003 for three months instead of the usual one month, and that she did not begin residing in the house until June, 2004. Hugo states that the parties were separated for a year, lists her address as 'El Monte' during that year, gives her address as their apartment in Montebello prior to June of 2003, and indicates that she and the girls did not move into the house until June of 2004."

Even if there was a factual basis for Hugo's argument, it is clear that substantial evidence supports the trial court's conclusions that the parties separated on March 3, 2006, that the deed was forged,[5] and that Hugo breached his fiduciary duties by the interspousal transfer of title to the couple's home to himself.

With regard to the equity line withdrawals, Hugo argues that the proceeds were used to pay the mortgage and it therefore benefited Julieta. He contends that, if the equity line was not used for this purpose, the home would have been foreclosed on sooner.

Nevertheless, the evidence fully supports the trial court's conclusion that Hugo's actions breached his fiduciary duties to Julieta, both by forging the deed and by not disclosing his use of the equity line.

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[5] Julieta testified that the signature was not hers. The testimony is itself substantial evidence of forgery. (Evid. Code, § 411.) Although Julieta's alleged signature on the deed was notarized, the signature on the deed was very different than her signatures on the petition and the Income and Expense Declaration. The deed signature was also very similar to Hugo's signature. Although there was no expert testimony that the signature was forged, a layperson, including the trial court, could conclude that there was a forgery just by looking at the signatures. On appeal, Hugo concedes the forgery.

C. *Consequences of the Breach of Fiduciary Duty.*

Section 1101, subdivision (g) provides: "Remedies for breach of the fiduciary duty by one spouse, including those set out in Sections 721 and 1100, shall include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs. The value of the asset shall be determined to be its highest value at the date of the breach of the fiduciary duty, the date of the sale or disposition of the asset, or the date of the award by the court."

Section 1101, subdivision (h) provides: "Remedies for the breach of the fiduciary duty by one spouse, as set forth in Sections 721 and 1100, when the breach falls within the ambit of Section 3294 of the Civil Code shall include, but not be limited to, an award to the other spouse of 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty."

Civil Code section 3294 is the general punitive damages section. "Because Civil Code section 3294 requires proof by 'clear and convincing evidence' of fraud, oppression, or malice, we must inquire whether the record contains '"substantial evidence to support a determination by clear and convincing evidence . . . ."' [Citation.]" (*In re Marriage of Rossi* (2001) 90 Cal.App.4th 34, 40.) Although the trial court did not specifically mention the clear and convincing evidence standard, it did cite *Rossi*. In that case, the wife concealed lottery winnings from her husband and the court applied Civil Code section 3294 and awarded the husband 100 percent of the winnings. (*Rossi*, at p. 39.)

The trial court's citation of *Rossi* indicates that the trial court was aware of and did apply the proper standard. The evidence of forgery and undisclosed use of the equity line was essentially uncontested and it supports application of section 1101, subdivision (h) in this situation.

D. *The Award of 100 Percent of the Home Value to Julieta*.

The trial court stated: "The value of the property shall be determined to be the highest value with interest at the date of the breach of the fiduciary duty. The parties separated in about March 2006. The family residence was valued at about $400,000 in March 2006. The amount owed on the property in March 2006 was $235,649.34. At the time of separation, the equity in the family residence totaled $164,351.00. (Exhibits 6 and A.)"

We conclude that the trial court erred in calculating the value of the family home.

First, the date of separation is not an appropriate date to use in this situation. Section 1101, subdivision (g) provides that the date to be used is (1) the date of breach of fiduciary duty; (2) the date of the sale of the asset; or (3) the date of the award by the court. In this case, the deed was forged on July 15, 2003, the property was foreclosed on in June 2008, and the award was made in July 2009. The trial court's use of the date of separation is not proper under section 1101, subdivision (g).

Second, it appears that the trial court selected the date of separation, March 6, 2006, as the property valuation date because it was a permissible alternate valuation date under section 2552, subdivision (b). That section states: "Upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any

portion of the assets and liabilities at a date after separation and before trial to accomplish an equal division of the community estate of the parties in an equitable manner."

Here, however, the purpose of the alternative valuation date was not to accomplish an equal division of the community estate. Instead, it was to punish Hugo under section 1101, subdivision (h) for his breach of fiduciary duty.

In other words, the only good cause cited here was the breach of fiduciary duty. When a breach of fiduciary duty is the reason for the use of an alternative valuation date, the more specific statute prevails over the more general one. (Civ. Code, § 3534.) As the trial court acknowledged, "The language of Family Code section 1101, subdivision (g) is unambiguous and mandatory." The trial court should have selected one of the dates specified in section 1101, subdivision (g).

Third, the trial court erred in determining the market value of the property. Evidence Code section 813 provides: "The value of property may be shown only by the opinions of any of the following: [¶] (1) Witnesses qualified to express such opinions. [¶] (2) The owner or the spouse of the owner of the property or property interest being valued." The specific items an owner or expert may rely on, and the proper valuation methods, are detailed in Evidence Code sections 814 through 820.

But in this case there was no such evidence. Attorney Bernheim showed Hugo a printout from Zillow.com[6] and asked some questions about it. Hugo said he didn't

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[6] Zillow "is a home and real estate marketplace dedicated to helping homeowners . . . find and share vital information about homes, real estate and mortgages.
[footnote continued on next page]

understand the printout but the trial court admitted it into evidence anyway and relied on Zillow in making its market value decision.

While the trial court could have taken judicial notice of the Zillow website, it was not asked to do so. (Evid. Code, § 452, subd. (h).) If it had done so, it could take notice of the existence of the website, but not of its factual content. (*Searles Valley Minerals Operations v. State Bd. Of Equalization* (2008) 160 Cal.App.4th 514, 519.) If the trial court had nevertheless used the website, it would have found a disclaimer stating that Zillow's estimates are not appraisals but were to be used merely "as a starting point in determining a home's value."[7] If the trial court had studied Exhibit 6, the Zillow printout, it would have found the Zillow estimate, dated April 4, 2009, was $216,500.

Attorney Bernheim pointed to a chart on the first page of the exhibit entitled "Market Value Change" but it is not clear if the exhibit was specific to the property or a general market trend analysis. The second page of the exhibit shows, however, a sales history of $90,000 in July 1998, 216,000 in July 2003, and $203,915 in August 2008.[8] These figures do not support a market value of $400,000, and the use of that figure by the trial court was unsupported by the evidence. Even Julieta did not testify to that figure.

[footnote continued from previous page]
Zillow's database of more than 110 million U.S. homes includes homes for sale [and] home values" (At http://www.zillow.com as of Apr. 12, 2013.)

[7] At http://www.zillow.com/howto/DataCoverageZestimateAccuracy.htm, as of April 12, 2013.

[8] The last number was apparently the price at the foreclosure sale.

Hugo listed the home in his property declaration at a fair market value of $250,000 with debts of $216,000.

We therefore conclude that the trial court erred in selecting a date of valuation and in applying a market value of $400,000 to the property without receiving competent evidence of the value of the property. (Evid. Code, §§ 813-820; see generally Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2012) ¶ 8:1405-8:1410.)

In reaching this conclusion, we recognize that "[t]he trial court possesses broad discretion to determine the value of community assets as long as its determination is within the range of the evidence presented. [Citation.] The valuation of a particular asset is a factual question for the trial court, and its determination will be upheld on appeal if supported by substantial evidence in the record. [Citation.]" (*In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 670.)

But, as the quote indicates, the trial court's broad discretion must still be supported by substantial evidence. Since the valuation of the home was not supported by any competent evidence, the case must be remanded for further proceedings on the issue.

III

THE TRIAL COURT'S AWARD TO JULIETA OF 100 PERCENT OF HUGO'S PENSION

In addition to awarding Julieta 100 percent of the community interest in the family home, the trial court awarded Julieta 100 percent of the community property interest in Hugo's pension. The court said: "The court finds a community property interest in Respondent's pension plan, Southwest 57. As a further result of Respondent's Breach of

Fiduciary Duty . . . Petitioner is awarded 100 percent of the community property interest in Respondent's pension. Petitioner shall contact . . . the QDRO center to prepare a Qualified Domestic Relations Order (QDRO) on Respondent's pension."[9]

The order is not entirely clear but the general rules are well stated in *In re Marriage of Cooper* (2008) 160 Cal.App.4th 574 (*Cooper*): "'Upon dissolution of a marriage, the trial court has broad discretion in the division of the community property interest in a spouse's pension rights and can exercise its discretion in either of two ways. The trial court may either determine the present value of community property rights and award them to one spouse with offsetting community or other assets to the other (commonly called the cash out method), or it may divide the community interest in kind between the spouses, reserving jurisdiction to supervise future payments to each spouse. [Citation.] [T]he trial "court retains the discretion to divide the community assets in any fashion which complies with the provisions of [section 2550]" [Citations.]' [Citations.] [¶] Family Code section 2550 provides that, except as otherwise agreed by the parties or specifically provided by statute, the trial court must 'divide the community estate of the parties equally.' This equal division requirement applies to retirement plan survivor benefits. Family Code section 2610, subdivision (a), provides: 'Except as provided in subdivision (b), the court shall make whatever orders are necessary or appropriate to

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9 "The process of considering and weighing the relevant spousal support factors is a *judicial function* . . . . Therefore . . . the court *cannot* delegate to a *nonjudicial officer* . . . the power to make binding factual findings and exercise judgment in determining the relevant circumstances for the purpose of setting spousal support." (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 6:511, p. 302.9, citing *In re Marriage of Olson* (1993) 14 Cal.app.4th 1.)

ensure that each party receives the party's full community property share in any retirement plan, whether public or private, including all survivor and death benefits . . . .' Subdivision (b) of section 2610 provides that the court shall not make any order that increases the amount of benefits payable by the retirement plan or that requires the payment of benefits before the member retires unless the plan allows such payments. Section 2610, subdivision (a)(1), provides that the court shall '[o]rder the disposition of any retirement benefits payable upon or after the death of either party in a manner consistent with Section 2550.' [¶] Generally speaking, a trial court's division of the community interest in retirement rights '"will not be interfered with on appeal unless an abuse of discretion is shown. The criterion governing judicial action is reasonableness under the circumstances. The method adopted may vary with the facts in each case." [Citation.]' [Citation.] 'Whatever the method that it may use, however, the superior court must arrive at a result that is "reasonable and fairly representative of the relative contributions of the community and separate estates." [Citation.]' [Citation.] *But, except as otherwise agreed by the parties or specifically provided by statute, no trial court has discretion to divide the community estate unequally and if it does so, the trial court errs as a matter of law.* (Fam. Code, § 2550.)" (*Id*. at pp. 579-580, italics added.)

It is of course true that section 1101, subdivisions (g) and (h) are statutes providing for unequal distribution in cases of breach of fiduciary duty. But, by their terms, those subdivisions apply only to the asset undisclosed or transferred in breach of the fiduciary duty. The pension plan does not fall within that definition so the general rule of equal distribution must apply to it.

In *Cooper*, the appellate court held that the trial court erred as a matter of law when it "allocated . . . the entirety of this [community property] benefit without requiring an offsetting payment to appellant." (*Cooper*, *supra*, 160 Cal.App.4th p. 580.) Under section 2550, the community portion of the pension benefit must be divided equally. (See also § 2610.)

Equal distribution of the community property portion of the benefit must also be calculated under the time rule of *In re Marriage of Brown* (1976) 15 Cal.3d 838, 847-848. (See *Cooper*, *supra*, 160 Cal.App.4th at p. 577.) The order here does not specify the calculation of the time rule. (See generally *In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 509, fn. 3.) And, as discussed above, section 2550 does not authorize the entire community property pension interest to be given to one party as a penalty for breach of fiduciary duty unless the pension plan was itself the subject of the breach of fiduciary duty.

We need not go further, however, for it is clear from our discussion above that the trial court will have to recalculate the division of property after properly determining the value of the family home. As part of such recalculation, the trial court is to reconsider and modify its order awarding 100 percent of Hugo's pension to be paid to Julieta. The trial court is to apply the criteria set forth in *Cooper*, *supra*, 160 Cal.App.4th 574. As noted in that case, it is often easier to award the non-employee spouse an offsetting payment while confirming the pension benefit to the employee spouse. (*Id*. at pp. 580-581.) In any event, the community property portion of Hugo's pension must be divided equally.

IV

THE RETROACTIVE SUPPORT ORDER

Finally, Hugo contends the trial court had no authority to make the support order retroactive. The court's decision was filed on July 6, 2009. It states: "On June 23, 2008, Respondent was ordered to pay temporary child support in the amount of $692.00 for both of the minor children commencing June 1, 2008 . . . . This order was made without prejudice subject to final determination at the time of trial.

After considering the income of each party, the court ordered child support in the amount of $1,154 for both children commencing June 1, 2008, through June 30, 2009. "The difference between temporary child support of $692.00 and child support now ordered in the amount of 1,154.00 is $462.00. Respondent owes retroactive child support in the amount of $462.00 for twelve (12) months for a total of $5,544.00."

With regard to spousal support, the amount was raised from $266 per month to $300 per month, retroactive from the filing date of July 6, 2009, to May 1, 2009. The same legal considerations apply to this award as to the retroactive award of child support.

Hugo contends these orders violate section 3653, subdivision (a), which provides : "An order modifying or terminating a support order may be made retroactive to the date of the filing of the notice of motion or order to show cause to modify or terminate, or to any subsequent date, except as provided in subdivision (b) or by federal law (42 U.S.C. § 666(a)(9).)"

Hugo cites *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269: "The statute thus permits the trial court to make its ruling retroactive to the filing date of the motion,

but no earlier." (*Id.* at p. 300.) The appellate court also stated: "In exercising its discretion concerning retroactivity, the trial court was required to analyze the children's then current needs, as measured by the parents' ability to provide support. To the extent its focus was on the parents' expenses, rather than on the children's needs, the court abused its discretion." (*Ibid.*)

In this case, section 3653, subdivision (a) is applicable because there was a prior temporary child support order and a spousal support order dated June 23, 2008. Although the order states that it is "temporary and without prejudice," federal law (42 U.S.C § 666(a)(9)) limits retroactivity to the date of service of the order to show cause or the notice of motion for modification.[10]

In *County of Riverside v. Keegan* (1997) 54 Cal.App.4th 269 (Fourth Dist., Div. Two), we held that child support was properly awarded retroactive to the date the complaint was filed. Our Supreme Court reversed this decision in *County of Santa Clara v. Perry* (1998) 18 Cal.4th 435, 438. The court approved a Sixth District Court of Appeal opinion, which held that support orders can be made retroactive only to the filing date of the notice of motion or order to show cause for support. (*Ibid.*) Our Supreme Court explained its reasoning in some detail and concluded that "[t]he statute cannot reasonably be read to permit courts to make a support order retroactive to a date *prior* to the filing of the notice of motion or order to show cause." (*Id.* at p. 446.)

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[10] The modification rule is to be contrasted with an original child support order, which may be made effective to the date of filing of the petition. (§ 4009.)

In the instant case, it appears there was no motion or order to show cause. The issue was determined at trial even though there were prior support orders in 2008. As our Supreme Court indicated in *Perry*, at least part of the legislative intent was to encourage the filing of motions to encourage prompt establishment of child support. (*County of Santa Clara v. Perry*, *supra*, 18 Cal.4th at p. 446.) Without such a filing, we conclude there cannot be a retroactive order. (See generally Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 6:511.)

V

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with the following directions:

1. The trial court is directed to reconsider the division of community property by (1) using a valuation date specified in Family Code section 1101, subdivision (g); and (2) obtaining and considering an opinion of market value of the home on the selected date as required by Evidence Code section 813. Property is to be divided equally in accordance with Family Code section 2552, subdivision (b) except for the penalty award for breach of fiduciary duty regarding the home under Family Code sections 1101, subdivisions (g) and (h).

2. Reconsideration of the division of community property is to include reconsideration and modification of the trial court's previous order awarding 100 percent of Hugo's pension to Julieta. Such reconsideration shall be in accordance with the views expressed in this opinion and the criteria set forth in *Cooper*, *supra*, 160 Cal.App.4th 574.

3. The court is directed to modify its child support and spousal support orders to eliminate their retroactive effect and to begin the modifications on the date of the award (July 6, 2009). The final division of community property should give Hugo credit for any improper retroactive payments he made. For child support, this would include payments between June 1, 2008, and June 30, 2009. For spousal support, this would include payments between May 1, 2009, and July 6, 2009.

In all other respects, the judgment is affirmed. Appellant is awarded his costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.